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No. 90-1325

Supreme Court of the United States

OCTOBER TERM, 1990

UNELKO CORP., an Arizona corporation, and HOWARD G. OHLHAUSEN, an individual,

Petitioners,

v.

ANDY ROONEY, an individual, and CBS, INC., a New York Corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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IN THE

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The CBS/Rooney Brief Begs The Question As To Which Of The Defamatory Implications Of Rooney's Statement Is To Be Judged True Or False Under *Milkovich.*

The CBS/Rooney brief fails to address the dispositive inquiry mandated by *Milkovich.*[1] Under *Milkovich*, the

* Unelko Corp. is a privately owned Arizona corporation which has no parent or subsidiary company.

[1] *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695 (1990).

proper inquiry in a defamation case is whether a reasonable fact finder can conclude that a statement implies a false assertion of objectively verifiable facts.[2] Reasonable fact finders—specifically, the trial court and viewers who wrote to CBS/Rooney—have already concluded that Rooney's false statement that Rain-X "didn't work" implied that Rain-X "*does* not work." The trial court found that Rooney's statement constituted a "pronouncement . . . that [Rain-X] does not work."[3] Numerous viewers understood Rooney's statement to imply that Rain-X "does not work," and responded to this defamatory assertion by emphatically telling CBS and Rooney that Rain-X does indeed work.[4]

Nevertheless, the CBS/Rooney brief ignores this reasonable implication of Rooney's statement (i.e., that Rain-X does not work). Instead, the CBS/Rooney brief focuses exclusively on Rooney's subjective, after-the-fact and self-serving assertion that he only meant that Rain-X "did not work *for him.*" CBS/Rooney argue in their brief that the evidence of record fails to demonstrate the falsity of this latter proposition. What CBS/Rooney completely ignore is that *no* record was developed on the defamatory pronouncement that Rain-X "does not work." Indeed, the record that was partially developed focused exclusively on whether Rooney properly applied Rain-X.

Under *Milkovich*, the inquiry focuses on the falsity of Rooney's pronouncement that Rain-X does not work. The Ninth Circuit recognized that this assertion is capable of being proved false. It noted: "Whether Rain-X repels rain, facilitates window cleaning, and increases visibility are all

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[2] *Id.* at 2705.

[3] Pet. App. B-1 (April 25, 1989, Order of Judge Broomfield).

[4] Petition at 11, n.25.

capable of being proved true or false. Each determination rests on 'a core of objective evidence.'"[5] Unfortunately, this objective evidence that Rain-X "does work" became relevant only after *Milkovich*, and no factual record had been or was allowed to be developed on this issue. Thus, the Ninth Circuit's improvident refusal to remand the case deprived Petitioners of the opportunity to develop and present this critical evidence.

Consequently, Petitioners respectfully request that this Court exercise its power of supervision and grant their Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED, this 29th day of March 1991.

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[5] *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1055 (9th Cir. 1990) (*citing Milkovich*, 110 S. Ct. at 2707).